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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY DIXON,

Defendant and Appellant.

B207526

(Los Angeles County
Super. Ct. No. BA329496)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Frederick N. Wapner, Judge. Affirmed.

Cannon & Harris, and Gregory L. Cannon, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William
Bilderback and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

Larry Dixon appeals from the judgment entered after a jury convicted him of one count of selling cocaine. Dixon contends the judgment should be reversed because he wore jailhouse clothes throughout the trial, and because the trial court would not allow evidence of a statement exonerating him that he claimed was written by his co-defendant. We affirm, holding that Dixon waived the jailhouse clothing issue by failing to object, and that the trial court did not err by excluding the supposedly exonerating statement.

FACTS AND PROCEDURAL HISTORY

At around 5:00 p.m. on September 24, 2007, two undercover Los Angeles police officers saw Rick Kennedy buy cocaine from Larry Dixon and Lawanda Culverson in a Skid Row area known for drug sales. The officers saw Kennedy, with money in hand, approach Dixon and Culverson. Kennedy said something to Dixon, and then handed Dixon his money. Dixon put the money in his pants pocket and motioned to Culverson. She pulled from her bra a clear plastic bindle containing what looked like rock cocaine, removed three pieces of the substance, and handed them to Kennedy.

After Kennedy walked away, the undercover officers radioed for other nearby officers to detain him. They did, and, after searching Kennedy, found the three rock-like objects, which later testing confirmed were cocaine base. After Kennedy was detained, Dixon and Culverson walked away from each other in opposite directions. Culverson was stopped and searched, turning up \$22 in cash and a glass pipe. Dixon hopped on a bus, which was followed by yet more police officers, who detained and searched Dixon when he got off at the next stop. Dixon had \$729 in cash in his pocket, along with a car key. The officers looked around the area where Dixon and Culverson were first seen and traced the key to a rented 2007 Chevy. Inside the trunk of that car was a clear plastic bag containing \$1,200 in cash.

Dixon testified that the cash in his pocket belonged to his sister and that he was on his way to a check cashing store to buy her a money order so she could pay her bills. He did not know Culverson or Kennedy and did not make any hand gestures to Culverson. However, Culverson approached him as he was walking and asked if he had a girlfriend

and also asked for his phone number. He gave Culverson his phone number, and then walked on to catch his bus.

Dixon's sister, Barbara Dixon (Barbara), testified that she lived in Newhall and had rented the car whose key her brother had been holding. According to Barbara, she and her boyfriend drove from Newhall to downtown Los Angeles so she could buy microphones for her children, who were trying to start a rap group, and to buy clothes in the Garment District. The cash in the trunk was hers, as was \$675 she gave to Dixon in order to buy her a money order. She gave Dixon the car keys because her boyfriend was arguing with her about leaving.

After the prosecution rested, Dixon tried to introduce a handwritten statement that he claimed came from Culverson. It said: "I, Lawanda Culverson, number 9952681,¹ plead guilt [*sic*] to the sales case. Larry Dixon had nothing to do with what I was doing on September 24, 2007. Will you please let him go? It was all me. He did not know what I was doing that day. Please let Larry Dixon go. Please." Dixon contended the writing was admissible under Evidence Code section 1230 as a declaration against Culverson's penal interest. As an offer of proof, Dixon's lawyer said Dixon told him that Culverson gave him the note at some undisclosed date, and that the handwriting was hers.

Both the prosecutor and Culverson's lawyer objected that the document was not admissible because the circumstances made it suspect and there was insufficient evidence to authenticate the writing. As a result, they contended it was not sufficiently trustworthy or reliable for admission under Evidence Code section 1230. The trial court cut off argument on the reliability issue and focused instead on whether the statement was in fact against Culverson's penal interest. The court ruled that the statements purporting to exonerate Dixon were not against Culverson's penal interest and were therefore not admissible on that basis. Only the statement that she was guilty of drug sales qualified, the court found, and that statement was not relevant to Dixon's defense.

¹ The trial court had trouble reading this number, but believed it was supposed to be a booking number.

Dixon wore jail clothes throughout the trial. He contends this violated his constitutional rights to due process, equal protection and a fair trial, and asks us to reverse on this ground. He also contends the trial court erred by excluding evidence of Culverson's written statement, and that the cumulative effect of these errors requires reversal as well.

DISCUSSION

1. *Dixon Waived the Jailhouse Clothing Issue, and Even If Error Occurred It Was Harmless*

Throughout the trial, Dixon wore a county jail-issued jumpsuit with the words "County Jail" printed on them, but his lawyer did not object to him doing so.² Although the right to be tried in civilian clothing is a constitutional right valuable to a fair trial, it can be waived by the failure to make a timely objection. (*People v. Taylor* (1982) 31 Cal.3d 488, 495-496 (*Taylor*).) We therefore hold that Dixon waived the issue.³

Dixon contends the waiver rule does not apply because there was no apparent tactical reason for his lawyer to refrain from objecting about his clothing. He bases this on two things: (1) Right after its holding that the issue is waived by a failure to object, the *Taylor* court also noted that there might be rare instances where defense counsel makes a tactical decision not to exercise that right, and that the trial courts should be reluctant to interfere with that decision. (*Taylor, supra*, 31 Cal.3d at p. 496.); and (2) at the post-trial settled statement hearing, the trial court recounted a conversation with Dixon's trial lawyer where the lawyer said Dixon was homeless, had no family in Los Angeles, and that his family tried but failed to get clothing for Dixon.

Dixon takes this to mean that the waiver rule does not apply if his lawyer did not have a tactical reason for his failure to object, and that his trial lawyer's comments show

² These facts appear in a post-trial settled statement issued by the trial court.

³ His lawyer's waiver of the issue is the subject of a separate habeas corpus petition based on a claim of ineffective assistance of counsel. We summarily denied that petition in a separate order.

that no such reason existed. Assuming for the sake of argument that his lawyer's statements indicated the absence of a tactical reason for his failure to object about Dixon's jailhouse clothing, we reject Dixon's interpretation of *Taylor*. In effect, Dixon is trying to bootstrap the *Taylor* court's observation about the possibility of a defense lawyer's intentional and tactical failure to object about jailhouse clothing onto its previous discussion about a waiver of the issue by not making the objection. As we read it, the *Taylor* court merely noted that in some few cases, the lack of an objection might be tactical, and did not state, or mean to suggest, that absent such a reason the failure to object did not waive the issue. Otherwise, the exception Dixon relies on would swallow the rule because, as the *Taylor* court noted, it would be rare to make such a tactical decision.

We alternatively hold that even if no waiver occurred, any error was harmless beyond a reasonable doubt. (*Taylor, supra*, 31 Cal.3d at pp. 499-500.) The evidence against Dixon was strong. Undercover officers saw him working in concert with Culverson to sell cocaine to Kennedy. Dixon took Kennedy's money and put it in his pants pocket, then signaled for Culverson to hand the drugs to Kennedy. When Kennedy was detained by the police, Culverson and Dixon split up and tried to leave the scene. Dixon had more than \$700 cash in his pockets, and was carrying the key to a nearby car that had another \$1,200 in its trunk.

Dixon's only counter to this is his claim that he had nothing to do with Culverson, and that the money in his pockets and the cash in the car belonged to his sister and were not the proceeds of drug sales. He contends that by seeing him in jailhouse clothes every day, the jury was likely to view him negatively, leading the jury to doubt his credibility, thus creating prejudicial error. We disagree. Dixon's story depended far more on the corroborating testimony of his sister than it did on his testimony, because if the jury did not believe her, it was inconceivable they jury would somehow believe him. In short, even though Dixon was in jailhouse clothes, that fact would not have led the jury to disbelieve Barbara.

Barbara claimed she drove to Skid Row with nearly \$1,900 in cash in order to have her brother buy her a money order and to buy microphones for her aspiring rap singer children. After giving nearly \$700 to Dixon, Barbara claimed she left \$1,200 in the trunk of the car while she walked to a nearby park looking for old friends, and also left the car key with Dixon. Her version of events was doubtful at best, and the jury clearly found it unbelievable. Therefore, even if Dixon had worn civilian clothes, we hold that beyond a reasonable doubt the jury would have reached the same conclusion about Barbara's testimony, and therefore would have rejected Dixon's testimony as well.

2. *The Trial Court Properly Excluded Culverson's Purported Written Statement Exonerating Dixon*

Dixon contends the trial court erred by excluding Culverson's purported statement confessing her guilt and exonerating him because it was against her penal interest under Evidence Code section 1230 (section 1230). Section 1230 states: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." To qualify the written statement under this exception, Dixon had to show that the statement was against Culverson's penal interest when made, and that it was sufficiently reliable to warrant admission even though it was hearsay.

(*People v. Lawley* (2002) 27 Cal.4th 102, 153 (*Lawley*).)⁴

Dixon contends the trial court erred in finding the portions of Culverson's statement that exonerated him were not against her penal interest.⁵ We review the trial

⁴ Dixon also had to show Culverson was unavailable to testify at trial. (§ 1230.) Even though Culverson was tried along with Dixon, she declined to testify, and respondent concedes that she was therefore unavailable.

⁵ He does not address the first sentence of the statement, where she supposedly wrote, "I, Lawanda Culverson, number 9952681, plead guilt [*sic*] to the sales case."

court's ruling under the abuse of discretion standard. (*Lawley, supra*, 27 Cal.4th at pp. 153-154.)

Section 1230 does not apply to any statement, or portions of a statement, that are collateral and not specifically dis-serving to the declarant's penal interests. (*Lawley, supra*, 27 Cal.4th at p. 153.) The trial court's decision to exclude those portions of the statement that exonerated Dixon or asked for his release is based on this rule. According to Dixon, however, the statement that he had nothing to do with the events of September 24, 2007, and the plea that he be released, implicitly acknowledged Culverson's guilt and were therefore against her penal interests.

Dixon cites *People v. Garcia* (2008) 168 Cal.App.4th 261, 289 (*Garcia*) for this proposition, but it is inapplicable. At issue was whether a jailhouse note suggesting the defendant authorized his cellmate to issue threats to anyone who might testify against the defendant was hearsay. The appellate court held that statements in the note were hearsay implications of the defendant's guilt and were therefore *not* admissible under section 1230. (*Id.* at pp. 289-290.) The error was deemed harmless, however. (*Id.* at p. 292.) Therefore *Garcia* does not support Dixon's contention.

Instead, *Lawley* holds that statements of exoneration included along with admissions of guilt, such as that an innocent man was held in jail, were not admissible under section 1230 because they were "not within the penal interest exception." (*Lawley, supra*, 27 Cal.4th at p. 154.) The disputed portions of Culverson's statement fall within that category, and we therefore hold the trial court did not abuse its discretion by excluding them.

Although this was clearly against Culverson's penal interest, the trial court found it irrelevant to Dixon's defense. We agree with the trial court, but deem the issue waived as to that part of the trial court's ruling.

Dixon also contends the trial court erred by finding the statement was not trustworthy, but the court made no such finding, confining itself to whether the rest of the statement, where Culverson supposedly exonerated Dixon and pleaded for his release, was against her penal interest. We therefore do not address the trustworthiness issue.

Dixon also contends the ruling deprived him of his constitutional right to present a defense. Because the trial court properly excluded a hearsay statement under the ordinary rules of evidence, no constitutional violation occurred. (*People v. Prince* (2007) 40 Cal.4th 1179, 1243; *People v. Ayala* (2000) 23 Cal.4th 225, 269.)⁶

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

LICHTMAN, J.*

⁶ To the extent we have held that no errors occurred, there are no errors to accumulate for purposes of Dixon's cumulative error claim.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.